

Indiana Board of Special Education Appeals



Room 229, State House - Indianapolis, IN 46204-2798
Telephone: 317/232-6676

BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

IN THE MATTER OF:)
)
J. R., School Town of Munster,)
West Lake Special Education)
Cooperative)
)
Appeal from a Decision by:)
Dennis D. Graft, Esq.)
Independent Hearing Officer)

ARTICLE 7 HEARING NO. 1572.06

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

Procedural History

J. R. (hereafter, the “Student”) is a seventeen year-old who was in the tenth grade at a public high school in the School Town of Munster during the 2005-2006 school year.¹ The Student had been diagnosed with Attention Deficit Hyperactivity Disorder—Inattentive (ADHD) and has had several Sec. 504 accommodation plans developed for him due to his ADHD. A case conference committee (CCC) was held on January 11, 2005, after a school psychologist evaluated the student in 2004 for possible eligibility for special education and related services under 511 IAC 7-17 *et seq.* (“Article 7”). The CCC determined that the Student’s evaluation test scores and school progress reports did not indicate a learning disability.

During the 2005 school year, a Sec. 504 plan was developed for the student that reduced the amount of accommodations he received, but still provided accommodations such as weekly grade reports, a homework hot line, being seated at the front of the class, and receiving extended time on tests. On November 17, 2005, the Student’s father requested that the Student be reevaluated to determine if social/emotional issues had arisen that would affect his eligibility for special education services. The Student was re-evaluated on December 12, 2005. A CCC was held on January 24, 2006. The CCC again decided that the student was ineligible for special education services. Student’s father submitted on February 2, 2006, a written objection to the determination that the student was ineligible for special education services. He also submitted a Request for Mediation concerning the determination that the student was ineligible for special education services. He later requested an additional evaluation at public expense.

¹ The School Town of Munster and the West Lake Special Education Cooperative will be considered collectively as the “School.”

On January 30, 2006, the Student admitted to taking a video camera from a classroom. On February 1, 2006, he was suspended for ten days, pending possible expulsion. A manifestation conference under Sec. 504 was held on February 13, 2006, where it was decided that the camera theft was not a manifestation of the Student's disability. An expulsion meeting was scheduled for February 28, 2006, but was continued upon the father's request and finally held on March 16, 2006. The Student was expelled until January 16, 2007.

After placing the Student in a private school in South Carolina on or about March 4, 2006, the father submitted on April 17, 2006, to the high school assistant principal a document entitled "Exercise of Previous Notice of Intent to Withdraw." The school did not deem the student as withdrawn but transferred.

The Student, by his father, requested an Article 7 due process hearing on March 14, 2006. Dennis D. Graft, Esq., was appointed as the Independent Hearing Officer (IHO) on March 14, 2006. The parties were notified of this appointment. The IHO conducted pre-hearing conferences on March 27, 2006, and May 24, 2006. The following issues were determined in the IHO's Pre-Hearing Order of March 27, 2006:

1. Did the School fail to supply a complete set of records (including the MMPI-A) in a timely fashion and in response to a parental request?
2. Did the School fail to supply the criteria for selecting an independent educational evaluator at public expense?
3. Did the School fail to provide a doctor-requested teacher evaluation rating scales (Connors) in a timely fashion?
4. Did the School fail to conduct an appropriate educational evaluation?
5. Did the School fail to identify the Student as eligible for special education services?
6. Did the School fail to provide a free appropriate public education (FAPE) designed to meet the Student's needs based on his disability?
7. Did the School fail to correctly identify the Student's behavior as a manifestation of his disability and then administer inappropriate disciplinary action without due process?
8. Did the School refuse to discuss alternative placement options during the time of the Student's suspension or expulsion?
9. Did the School refuse to reconvene the CCC to consider decisions on previously suggested alternative placement recommendations?

Additional background information will be supplied in the course of this opinion. The IHO addressed several discovery matters raised by the parties.

On May 9, 2006, the father filed a Motion for Default Judgment related to the school's alleged failure to provide various documents. The IHO denied the motion on May 10, 2006. The hearing was held on May 24, 25, 26, June 8, 13, 26, 30, and August 11, 2006. The decision deadline was set for September 1, 2006. The hearing was closed to the public. The Student did not attend the hearing. All extensions of time were initiated by the parties and addressed by the IHO. The IHO issued his written decision on September 1, 2006. The IHO determined fifty-one (51) Findings of Fact. The IHO addressed each of the nine (9) issues separately and issued one (1) Order. The parties were properly notified of their administrative appellate rights.

The IHO's Written Decision

Findings of Fact²

1. The Student is a seventeen (17)-year-old who was a 10th grade student at a public high school during the 2005-2006 school year. The Student had been attending this public school since August, 2003, when he moved from a nearby school corporation.
2. A number of years ago, the Student was diagnosed with Attention Deficit Hyperactivity Disorder-Inattentive (ADHD) by a psychiatrist.
3. Various Sec. 504 plans have been developed for the Student for the last few years, based upon the Student's ADHD inattentive type and related problems.
4. Another independent hearing officer, who conducted a due process hearing under 511 IAC 7 ("Article 7") in 2003, determined the Student was not eligible for special education and related services. The decision was not appealed and the various Findings of Fact and Conclusions of Law are hereby incorporated by reference herein.
5. During the Student's 8th grade year, he continued to have a Sec. 504 plan due to his ADHD and related school academic problems.
6. In April, 2004, during the Student's Sec. 504 conference, the School and the Student's father discussed having a psychological evaluation of the Student. The School made a request for such psychological evaluation. However, the father did not consent to such testing until November 2004 during the Student's 9th grade year.
7. The school psychologist evaluated the Student in November 2004. The school psychologist reviewed various prior psychological evaluations of the Student. He noted the following: the referral stated that the Student sometimes lacks motivation, that the Student passed the ISTEP in the 8th grade, the Student was taking Concerta for control of his ADHD, the Student sometimes has stressful interactions with his parents regarding school matters, and that the Student was cooperative during the evaluation. The psychologist further noted that the only disciplinary referrals were three tardies to his algebra class.

On the Wechsler Intelligence Scale For Children-Fourth Edition, the Student obtained a full scale IQ of 108, which fell within the average ability range. His verbal comprehension, perceptual reasoning and working memory were all within average limits. His processing speed was 126, which was in the superior range. The psychologist noted that this profile was not typical for a student with ADHD, but noted the Student was on medication for his ADHD.

On the Wechsler Individual Achievement Test-Second, the Student obtained the following:

- (1) Reading: composite standard score of 109, which was in the upper average range and consistent with his grade placement.
- (2) Word reading: standard score of 103 (9th grade level).

² The IHO's written decision has been edited slightly for format purposes.

- (3) Reading Composition: standard score of 106 (beginning 11th grade level).
- (4) Decoding skills: standard score of 119 (college level).
- (5) Numerical operations: standard score of 110 (college level).
- (6) Spelling: standard score of 103 (10th grade level).
- (7) Written Expression: standard score of 102 (10th grade level).

The evaluation noted that the Student's academic achievement was consistent with the expectations of his measured general intelligence; he does not appear to have a learning disability in reading, math or written expression and has the talent to be a C student in all classes without extraordinary effort.

On the Minnesota Multiphasic Personality Inventory for Adolescents (MMPI-A), the Student obtained T-scores that were largely within normal limits for his age. There was a moderate elevation in the 9 scale, which suggested an elevation in activity level, which the psychologist viewed as common among adolescents and not unusual for those diagnosed with ADHD. Also, the Student scored a standard score of 38 on the depression scale, which the psychologist viewed as arguing against a depressive disorder. The psychologist also noted that the low zero scale was further support against depression as a significant problem of the Student and suggested that the Student is socially outgoing, possibly to the extent that he neglects introverted activities, such as doing school assignments.

On the Rotter Incomplete Sentence Report, the responses of the Student were viewed by the psychologist as substantiating the lack of a depression diagnosis. The responses also indicated to the psychologist that the Student displays some signs of difficulty managing anger, which he expressed toward his parents.

Further, during the clinical interview, the psychologist opined that the Student did not display any overt outward signs of depression.

On the Kinetic Family Drawing, the Student drew himself away from his parents, which the psychologist viewed as indicative of family discord.

8. Also, on January 4, 2005, the Student was administered the Woodcock-Johnson III. The evaluator noted that the Student was cooperative during the testing session and behaved appropriately.

In the area of reading, the Student was administered two sub-tests, with the Student scoring as follows:

- (1) Letter-Word Identification: a standard score of 98, which was in the average range; and
- (2) Passage Comprehension: a score of 93, which was also in the average range.

In Mathematics, there were two sub-tests, with the Student scoring as follows:

- (1) Math Calculations: a standard score of 111, which was in the above/high average range; and
- (2) Applied Problems: a score of 93, which was in the average range.

In Written Language, there were two sub-tests, with the Student scoring as follows:

- (1) Spelling: a standard score of 112, which was in the above/high average range; and
 - (2) Writing Samples: a score of 115, which was in the above/high average range.
9. A case conference was held on January 11, 2005, to review the various evaluations, the Student's present levels of performance, and to determine whether the Student was eligible for special education services. The CCC determined that the Student's evaluation test scores and school progress reports did not indicate a learning disability, that the Student is not currently suffering from depression, and there were no significant emotional factors. The CCC determined that the Student did not qualify for special education or related services. The Student's father did acknowledge that he was given the opportunity to participate in the CCC but wrote "present decision pending review and discussion with the (Student's) mother." The father was provided with copies of his procedural rights and he did not request a due process hearing concerning the case conference committee's determination.
 10. On September 8, 2005, for the Student's 10th grade year, a Sec. 504 plan was developed for the Student. This plan provided for various accommodations including: weekly grade reports completed by teachers and given to the Student on Fridays, which he was to deliver to his parents; homework hot line; being seated near the front of the class; and extended times on tests. This was a reduction of the number of accommodations the Student had in 9th grade.
 11. On November 17, 2005 the Student's father, in writing, requested the Student be reevaluated to determine his eligibility for special education services and/or additional services under Sec. 504. The request specifically expressed concerns if any social/emotional issues had developed that were negatively impacting the Student's performance.
 12. Based upon this written request, the School's assistant principal submitted to the local special education cooperative a "Request for Psychological/Diagnostic Assistance" dated November 23, 2005. The question to be addressed was "Do we have an emotional issue that is impacting educational progress?" It was noted in the request that the Student was failing two classes, was not following through with support services in place utilizing his Sec. 504 plan, there was a difficulty in understanding "why" the Student wanted to fail, that the Student lacked motivation to complete work; didn't seem to have numerous friends, and the Student had poor organizational skills.
 13. The evaluation was administered on December 12, 2005. The school psychologist reviewed school records, interviewed the Student and parent, administered to the Student the Sentence Completion Test, Projective Drawings and the Minnesota Multiphasic Personality Inventory-Adolescent (MMPI-A). The psychologist noted that in the results of the prior evaluation on November 22, 2004, the Student was highly unmotivated to complete his work, and reportedly has numerous friends. During the clinical interview, the Student indicated he wanted to drop out of school but remains in school based upon his parents' requests. The Student informed the psychologist he would "stay in school and try to get all D's and get through it." The Student reportedly was prescribed Focalin

for his ADHD but was not taking the medication. At the due process hearing the father testified that the Student was prescribed a different medication. At this time, the Student denied ever feeling sad. The Student discussed problems with his parents. Based upon the Student's responses on the MMPI-A, the psychologist opined that results suggested that the Student is not assertive but is very outgoing, has a high energy level, and a general lack of depression or anxiety, scored positive on the McAndrews Alcoholism Scale, and had high scores on the drug problems and drug acknowledgment scales. When asked to draw a person and specifically told to not draw a stick person, the Student drew a stick person, which the psychologist viewed as suggestive of oppositional behavior, and a lack of motivation and drive. Based upon the Incomplete Sentence Compilation Test, the psychologist viewed the Student's responses as suggestive of a high affinity for being with friends, a chauvinistic attitude toward females, and a disgruntled disposition when dealing with people in authority generally.

14. In early January, 2006 the father provided and requested the school have the Student's teachers complete Connors' Behavior Rating Scales. The various teachers completed these scales by January 13, 2006. The school guidance counselor made copies of the rating scales and placed the originals in with the Student's weekly Friday packet of information (as required by his Sec. 504 plan), sealed the envelope and, following protocol, gave the envelope to the Student for delivery to his parents. The guidance counselor believed this was done on January 20, 2006.
15. A case conference was held on January 24, 2006, to review the December 12, 2005 Supplemental Psychological Report and consider the Student's eligibility for special education services. The committee included the high school assistant principal, who had previously been a teacher of emotionally disabled (ED) Students and held a teacher certification in ED. The Student's present levels of performance were reviewed. The Student had failed five of seven classes, with D's in the remaining two classes. Written reports were submitted by five of his current teachers. Failure to do work and motivation problems were noted by all of the teachers. The Student had previously been working at a job 3 to 4 times per week, with only one of these work periods being on a weeknight. The Student would work until approximately 11:00 on the work night. The school psychologist, who administered the November, 2004 Psychological Evaluation and the December, 2005 Supplemental Psychological Evaluation reviewed the results for the rest of the committee. The psychologist went over most of the information found in Findings 7 and 13 hereinabove. The committee was advised that the Student had recently been prescribed and started taking Strattera for his ADHD. After a review of all of this information, the committee determined that the Student was ineligible for special education services. It was specifically noted in the committee's notes that the Student was neither LD nor ED eligible under Article 7. There were subsequent discussions about addressing the Student's needs (although not determined eligible under Article 7). Discussed were the school's career center (vocational) for the Student's junior and senior years and an alternative school that the Student could attend and receive credit towards his local high school diploma. The alternative school was on a point system, with Students attending in either the morning or late morning and early afternoon for approximately three hours of intense individual school work and then working at a job for a part of the day. There was no homework, with all school work being done during school. The Student expressed his willingness to visit this school for possible attendance

for the balance of the semester. The father recorded this conference, as did the school's assistant principal. The father was provided a copy of procedural safeguards. The father expressed his dissent to the determination that the Student was ineligible for special education services and would submit any written comments within ten days. There was a discussion (not on the CD recording of this conference) between the father and the high school guidance counselor concerning the completed Connors behavior rating scales. The guidance counselor advised the father that she had placed the completed rating scales in the Student's weekly progress envelope the previous Friday. No other action was taken by either party.

16. On January 30, 2006 the Student took a video camera from a classroom. On January 31, 2006, when confronted by the school's Assistant Dean of Students, the Student admitted he had taken the camera and did not implicate anyone else in the theft of the camera. On February 1, 2006, the Student was suspended for ten days, pending possible expulsion. An expulsion examiner was appointed and the suspension was extended until the expulsion meeting was held and a determination was made by the expulsion examiner.
17. On February 2, 2006 the Student's father submitted a written objection to the January 24, 2006 case conference's determination that the Student was not eligible for services under Article 7. On February 6, 2006 the father submitted another written objection to this determination and requested an independent educational evaluation (IEE) at public expense.
18. Due to the Student being under a Sec. 504 plan, a manifestation conference under Sec. 504 was held on February 13, 2006 to determine if the Student's theft of the camera was a manifestation of the Student's Sec. 504 disability (ADHD). It was determined that there was no relationship between the theft and the Student's Sec. 504 disability. The parent and the school's assistant principal each tape recorded this conference. The father had not yet received the completed behavior rating scales by this date and he so advised the assistant principal, who subsequently copied and provided copies to the father. The father acknowledged during this conference that the Student was not learning disabled. He further opined that the ADHD medication (Strattera) had not shown effectiveness.
19. On February 14, 2006, the director of the local special education cooperative agreed to arrange for an IEE at public expense and proposed four local individuals deemed qualified to conduct the IEE under the criteria to which the local cooperative must adhere when selecting its own evaluators.
20. The Student's father, on February 21, 2006, submitted a Request For Mediation concerning the January 24, 2006 case conference's determination that the Student was not eligible for special education services to which the school never agreed. On this same date, the father, in response to the cooperative's letter dated February 14, 2006, stated his intention to obtain his own qualified evaluator but not one of the four proposed evaluators. The father further requested the policy establishing the criteria the school uses to select its own evaluators so that he could ensure that his independent evaluator met those criteria.

21. On February 27, 2006 the Student's father requested copies of all available records on the Student. The request specifically included all evaluation records in the control or possession of the school or local special education cooperative, including but not limited to test answer sheets, score compilations and other evaluation records not otherwise restricted from disclosure. The request also requested copies of any records recently received from the Student's previous public school and another special education cooperative. The request also requested that if there were records which the school was unable to provide copies, to then provide the father with a list of any such records and provide information when the father may access those records.
22. The expulsion meeting was scheduled for February 28, 2006. However, on February 24, 2006 it was continued without date upon the Student's father's request, the father's dissenting opinion regarding determination of ineligibility for Article 7 services and his request for mediation.
23. On March 3, 2006 the special education cooperative director and the Student's father had a telephone conversation. The director advised that the criteria for the independent evaluator was that the evaluator be a certified school psychologist or clinical psychologist in the State of Indiana. Further, based upon the large number of independent evaluators in the area, the criteria included that the independent evaluator must be from the area and the assessment conducted must be consistent with the requirements of 511 IAC 7-26. The father did not indicate he was considering an evaluator located outside the State of Indiana. Also, during the telephone conversation the director offered an expedited evaluation of the Student and home bound services. On March 22, 2006 the director followed up the conversation with a written summary of the conversation as to the criteria.
24. On March 7, 2006, the assistant principal of the public school, by letter, requested the expulsion examiner schedule the expulsion meeting as quickly as possible. As of this date the father had not agreed to the offer of an expedited evaluation by the local cooperative or to homebound services.
25. On March 8, 2006 the school received a request for records from a private school in South Carolina, which request indicated that on March 4, 2006 the had parents placed the Student in this private school. The parents had not provided any written notice to the school prior to this placement.
26. On March 9, 2006, the Student's father, by letter to the expulsion examiner, discussed his belief that the results of a mediation agreement could supersede and eliminate the need for an expulsion meeting. The father stated he had not received a response to his request for mediation and may file for a due process hearing, which he believed could supersede, and possibly eliminate, the need for an expulsion meeting. The letter further stated that the cooperative's offer of March 3, 2006 for homebound services or expedited evaluation was the first the father had received such an offer. The letter also informed the director that the father needed time to consider the offer, (confer with wife, advocate and the Student's psychologist). The letter stated further that the father was out of town from the evening of March 3, 2006 until the evening of March 7, 2006 (taking the Student to the private school), and also stated that the father had been unable to confer with the

advocate or psychologist. He further requested the expulsion examiner defer the expulsion meeting to give him time to respond to the director's offer.

27. On March 13, 2006 the parents advised the assistant principal, by letter, that their request for mediation had not been responded to by the school and they questioned the school's need for an additional evaluation and the possible interference with their IEE. Further, it was their intent to enroll the Student in a private program and seek reimbursement from the local school corporation. Also in this letter, the parents made their request for a due process hearing. Finally, the parents reiterated their request for copies of all school records and that the school had failed to provide any answer sheets score compilations, or other records related to the MMPI evaluation(s) conducted by the school and the resulting inability to evaluate the Student's needs and provide such data to their independent evaluator. This Hearing Officer was duly appointed on March 13, 2006.
28. On March 16, 2006 the expulsion meeting was held. The school and the father each presented evidence as to the theft incident and possible consequences of the theft. On March 20, 2006, by written report, expulsion examiner found that the Student admittedly stole a video camera from a classroom on January 30, 2006, there was a violation of school rules, and expelled the Student until January 16, 2007. The findings and expulsion were not appealed by the parents.
29. On March 20, 2006, various educational records were forwarded by the school to the parents.
30. On March 22, 2006 the Resolution Session was held. At this session copies of test protocols were provided to the father, as were letters from the special education cooperative director advising that the various records were forwarded on March 20, 2006, the parents' right to "inspect and review" any school records and the memorization of the telephone conversation of March 3, 2006.
31. The parents never agreed to the school's offer of an expedited evaluation, nor for homebound services. Neither parent, after January 31, 2006, requested an expedited evaluation of the Student by the school.
32. On March 27, 2006, this Independent Hearing Officer ordered that the parents "shall have the right to an independent educational evaluation at public expense, provided the evaluator is qualified to perform such an evaluation pursuant to the criteria set forth for an independent educational evaluation under Article 7, specifically 511 IAC 7-25-5, and the cost for such independent educational evaluation is comparable to the cost for such an evaluation in northwestern Indiana." Further, this Hearing Officer granted the school's Motion For Evaluation of the Student by school personnel. Further, this Hearing Officer ordered that the parties and their respective evaluators shall communicate to ensure that the evaluators do not administer the same instruments to the Student when performing the two educational evaluations.
33. On April 6, 2006 the father requested an in person review of all of the Student's records at the local special education cooperative and on April 13, 2006 the father reviewed these records. He apparently did not request copies of any items from these records.

34. On April 17, 2006, the father submitted to the high school assistant principal a document entitled "Exercise of Previous Notice of Intent to Withdraw", which referenced the father's letter of March 13, 2006 (See Finding No. 27 hereinabove). The father stated that he would "like to exercise the advanced notice of intent of withdrawing the Student from the (local) public school system". This letter also referred to school board policy 5130 (withdrawal process).
35. On April 18, 2006, the high school assistant principal responded in writing to the father's April 17, 2006 letter. The assistant principal did not deem the Student as withdrawn, only having transferred to the private school, and further, since the Student had been expelled, Policy 5130 was not applicable.
36. On May 8, 2006, the father wrote to the high school assistant principal concerning missing documents from the records supplied to him by the school, specifically, discipline related documents, from the middle school and high school records. Based upon this request, the assistant principal contacted the middle school and was informed there were additional discipline records stored on a computer, but which records had never been forwarded to the high school as part of the Student's permanent record. The assistant principal obtained these records and supplied them to the father.
37. On May 9, 2006 the father filed with this Hearing Officer his Motion For Default Judgment related to alleged failure of the school to provide various documents. On May 10, 2006 this Hearing Officer denied the Motion For Default Judgment and ordered that the school and school psychologist shall forthwith provide the father with any evaluation reports discussing the various evaluation instruments and the scoring of each evaluation instruments concerning the evaluation of the Student. These records were subsequently provided to the father by May 10, 2006.
38. Since March 3, 2003 the Student has been seen by a private psychologist. Initially, the psychologist noted the Student's ADHD, his present medications, academic difficulties, and sleep problems. Based upon a clinical interview and various testing, this psychologist gave a diagnosis of ADHD, predominately inattentive type, adjustment disorder with dysphoric mood, and Sleep Phase Disorder. The psychologist did not believe the Student had a mood disorder, major depression or bi-polar disorder. The psychologist recommended that if the Student did not show significant improvement on his present medication for his ADHD, that the non-stimulant Strattera be considered. On January 5, 2006 the psychologist proposed the Student's medication be changed to Strattera. On this date, he conducted a clinical interview of the Student. He did not observe that the Student had major depression or a major mood disorder. On February 4, 2006, the psychologist wrote in a letter that the Student had not yet been stabilized on an effective dose of Strattera and the psychologist was in the process of obtaining information (Connors' Behavior Rating Scales) from the public school as to his ADHD symptoms to serve as a baseline. The psychologist, based upon information from the Student and the father, understood that the Student was dared to take the video camera and has difficulty with impulsivity, especially with resisting peer pressure. The psychologist believed the theft was not premeditated, being more of a spur of the moment occurrence. He opined that expulsion of the Student was inappropriate as the Student

needs treatment, not punishment. The psychologist last saw the Student on February 16, 2006. On May 10, 2006, the psychologist, by letter to the father, advised that he had recently met with the Student (apparently on February 16, 2006), reviewed the Student's school evaluations, Connors' Behavior Rating Scales, and other school records. He also had reviewed the IEE of the Student, administered by a psychologist in South Carolina. Based upon this review, he opined that the Student has difficulties with sustained attention and has poor organizational skills. He further opined that the mild elevations on the psychopathic deviancy and hypomania scales on the MMPI-A were not suggestive of a major mood disorder but it may indicate a cyclothymic disorder in addition to the oppositional and conduct problem disorder of the Student. He noted that the Student displays some mild mood symptoms, which relate primarily to his academic situation. He proposed a highly structured educational program and monitoring of his unstructured time (after school and evenings). This monitoring of the Student's unstructured time was due to the Student's smoking, drinking, use of marijuana, and the Student's association with an antisocial peer group. During his testimony at the due process hearing, he believed the Student was self medicating by his use of marijuana. He also noted that one does not usually see cyclothymic disorder in children. He also believed the Student's ADHD was primarily affecting the Student's school performance and behaviors. He also did not see that the Student was unable to develop relationships, but was concerned about the type of peer relationships the Student was forming. Further, he did not believe, if the Student did have a cyclothymic disorder, that it was as significant a problem as the Student's ADHD and conduct problems. He also believed the Rorschach is a projective analysis testing instrument and it is critical to have other information or data to confirm any theory suggested by the Rorschach test. This psychologist does not have a background in education and is not a licensed school psychologist.

39. The Student was administered an IEE in South Carolina on April 3 and 4, 2006 by a school psychologist licensed in South Carolina. This psychologist reviewed the school psychologists' evaluations of 2004 and 2005, and the Connors Behavior Rating Scales completed in January, 2006 by various teachers of the Student, as well as interviewed the Student and his father. She noted that the Student had been previously diagnosed with ADHD inattentive type and diagnosed with major depression in 2002. She further noted that the Student had been suspended from school for taking a video camera on a dare and that random drug screens did not indicate continued marijuana use. The Student was alert, attentive and cooperative during the testing. The Student informed the psychologist that he was not on any medications for his ADHD. The Student reported he was scared and unhappy in his present placement at the private school. The Student reported he had not liked school in Indiana, was making D's and F's and basically slept in classes. The Student's approach on tasks was hurried and impulsive, with careless mistakes. The Student was administered the Woodcock Johnson-III Cognitive Battery with the following results:

<u>Area</u>	<u>IQ</u>	<u>Classification</u>
Verbal Ability	111	high average
Comprehension/Knowledge	111	high average
Working Memory	93	average
Processing Speed	110-114	high average
Visual Spatial	103	average

The psychologist noted significant differences indicated between specific information processing abilities, specifically, a significantly lower score in Auditory Working Memory (problems holding verbal information in short term memory), which is a characteristic of people with ADD. Academic skills for the Student were assessed using the Wide Range Achievement Test (WRAT-3), the Nelson Denny Reading Inventory (ND), and the Woodcock Johnson III Achievement Tests (WJ) as follows:

<u>Area</u>	<u>Standard Score</u>	<u>Grade</u>
Writing Fluency (WJ)	109	high school
Reading Speed (ND)	87	high school
Math Fluency (WJ)	111	high school
Reading Comprehension (ND)	106	10 th
Arithmetic (WRAT)	104	high school
Reading Fluency (WJ)	119	high school
Passage Comprehension (WJ)	106	high school
Written Expression (WRAT)	91	10 th

Social, emotional and behavioral levels of functioning were assessed using the Burks' Behavior Rating Scales completed by three employees of the private school. The Student had significant to very significant problems in three areas: excessive withdrawal, poor attention, and excessive suffering. No clear diagnosis was indicated, based upon this assessment. Also used was the Rorschach Inkblot Technique using the Exnor scoring system. This is a projective testing instrument. The psychologist viewed the results as positive for Depression and Coping Deficiency. The Student also completed the Beck Depression Inventory, with the results being very significant for signs of clinical depression, but the psychologist noted that this depression may be related to this current situation (placement at the private school). The Student's responses on the Incomplete Sentence test indicated significant dissatisfaction with his current private school placement. All of these testing instruments were projective testing assessments, which have no objective criteria. This psychologist concluded that:

- (1) The Student has average to high average cognitive abilities.
- (2) The Student's pattern of cognitive strength in processing speed (110-114) and weakness in working memory (93) was consistent with a diagnosis of ADD, or rapid cycling mood disorder.
- (3) The Student has academic skills of average to above average for his age and grade, but he was inconsistent in his performance.
- (4) The Student displayed a behavioral and emotional pattern of an adolescent with cyclothymic disorder (chronic fluctuating mood disturbances [hypomanic and depressive symptoms] with impairment in academic functioning).

The psychologist diagnosed the Student with ADHD and cyclothymic disorder. The psychologist recommended the following:

- (1) The use of anti-convulsants in addition to stimulant;
- (2) Intensive aerobic exercise and proper diet; and

- (3) Structured academic environment with consistent consequences and a behavioral system.

The psychologist viewed the Student eligible for special education services under “Other Health Impairment” due to his ADHD and “emotional disability” based upon the MMPI-A administered in November, 2004 due to the moderate elevation on the 9 scale (Hypomania) and the D scale (Depression), even though the Student’s standard score of 38 on the D scale was not significant. The psychologist opined that this scale measured reactive depression, not neurotic depression, which levels of depression fluctuates as one’s moods change. The psychologist also relied upon the MMPI-A administered in December, 2005, which indicated two areas of concern:

- (1) Scale 4, which relates to conduct disorder diagnosis with alcohol or drug problems, impulsive and aggressive, which the psychologist viewed as secondary to the Student’s ADHD and mood disorder.
- (2) Scale 9, which relates to acting out behaviors, including school (manic) problems, drug use, attentive problems, resentment of authority, and impulsive.

The psychologist did acknowledge that the Student was learning at the public school. The psychologist did not know if there was anything in the Connors’ Behavior Rating Scales if one’s distraction can be due to environmental stimuli. The psychologist was not familiar with Indiana’s Article 7. The psychologist relied solely upon the elevated Scale 4 on the MMPI-A as to the Student’s impulsiveness. The psychologist was not sure if the Student was fidgeting or squirmed in his seat while in school. The psychologist relied solely upon information from the Student’s father that the Student’s interpersonal relationships were not in depth and the Student used drugs minimally. The psychologist did not view the Student putting his head down in class as a hypomanic episode and stated that the Student may only be hypomanic outside of school. The psychologist did not ask the Student about his drug use and admitted this was an error. The psychologist did not rule out drug use by the Student before determining the Student had a cyclothymic disorder. The psychologist did not know if the Student’s father was a reliable source of information and she never contacted any public school personnel for any information concerning the Student. The psychologist acknowledged that when projective testing instruments are used one needs to verify any impressions with other data. This psychologist never observed the Student in a school setting and never spoke with his teachers.

40. A school psychologist evaluated the Student at the private school in South Carolina on April 11 and 12, 2006. This psychologist also observed the Student at this school. This psychologist testified to his observations of the private school programming for the Student. He described it as a private boarding school with a behavior program like a reform school (reform the Student’s behavior). The Student apparently has the same schedule every day with group discussions and non-academic activities in the morning then with an independent academic study program in the afternoon. All the male Students have crew cuts and there is a dress code, including wearing white shirts and ties in the afternoons. The Student’s life is very structured and controlled with constant supervision by school staff. Although the school is a co-educational facility, all activities appear to be segregated. The behavior program at the private school permits resident Student’s to gain privileges for compliant behavior. Based upon performance and behavior, a Student accumulates points. There are six different levels, with each when earned providing additional privileges, including eligibility for graduation from the

program. During the clinical interview and evaluation the Student was asked about his use of marijuana, alcohol, tobacco, and caffeine. The psychologist concluded, based upon the Student's responses, that the Student was regularly using marijuana, tobacco, and alcohol and excessively using caffeinated beverages. The psychologist believed that the Student, by using these substances, was self-medicating his ADHD. The psychologist, during the interview and evaluation, did not observe signs of attention or concentration problems in the Student. The Student reported being depressed at the private school but stated he was not depressed prior to being placed there. The Student told the psychologist that he had planned the theft of the video camera a number of days prior to the theft. The psychologist reviewed various school records, including two prior school evaluations, the Student's private treating psychologist's letters, and the evaluation done by the psychologist in South Carolina. The Student was administered the Weschler Adult Intelligence Scale-3rd Edition. On this instrument the Student scored a Full Scale IQ of 108, a Verbal IQ of 105 and a Performance IQ of 111. Further, the Student attained standard scores of 101 on the Verbal Comprehension Index, 116 on the Perceptual Organization Index, 108 on the Working Memory Index, and 128 on the Processing Speed Index. The Student's performance on this test was comparable to earlier test results done through the public school. All scores were in the average to high average range. The Student was also administered the Kaufman Test Of Educational Achievement-2nd Edition. The Student attained standard scores of 101 on the Letter and Word Recognition Subtest, 100 on the Reading Comprehension Subtest, 103 on the Math Concepts and Application Subtest, 105 on the Math Computation Subtest, 86 on the Written Expression Subtest, 108 on the Spelling Subtest, and 105 on the Nonsense Word Decoding Subtest. The Student was also administered the Beck Depression Inventory-2nd Edition, which suggests he is currently experiencing high levels of depression. The Student was also administered the Behavior Assessment System for Children-2nd Edition (BASC-2). On this instrument he had clinically significant elevations as to his "attitude to school" and "attitude to teachers". The Student also showed elevations in the at-risk range for sub-scales measuring depression, sense of inadequacy, attention problems, anger control, and inattention/hyperactivity. The Student was then asked to respond to reflect his feelings and attitudes prior to his placement at the private school. When this modification was made, the Student's profile scores were no longer clinically elevated as to his "attitude to teachers", depression and anger control. The Student also completed the Achenbach Youth Self-Reporting Scale, with the Student's responses not suggestive of any clinically significant elevations for anxiety or depression. Other behavioral rating instruments were administered to the Student. The Student's former classroom teachers at the public school completed BASC-2 Teacher Rating Scales. All of these teachers noted a weakness in the area of study skills but none of them had significant concerns for the Student in the areas of anxiety and depression. Based upon the school psychologist's testing results and review of the Student's other school records, he concluded that the Student would not qualify for eligibility under Article 7 in the areas of learning disability or emotional disability. The psychologist further opined that the parents' IEE failed to have supporting data to substantiate many of the conclusions stated based upon the Rorschach Test that was administered. He further believed that an elevation on the Scale 9 of the MMPI-A is not proof that someone is experiencing Mania. He did not see anything that supported the Student had a cycling mood disorder or grandiosity if the Student was truly hypomanic. He opined that he saw just the opposite in the Student, specifically, low self esteem. He was of the opinion that the Student has the ability to

maintain satisfactory interpersonal relationships but chose not to since it is easier to handle with less turmoil. He did not see the Student as LD since his IQ scores had been consistently in the average to above average range, with achievement scores commensurate with his IQ. He believed the Student had been making academic progress and mastering the curriculum but had declining grades because grades were no longer important to him. He believed the Student consciously performed poorly in his classes at the public school and was catching up on his sleep in class due to staying up late at night. He further believed one needs to first rule out substance abuse prior to a diagnosis of a mood disorder, which the parents' independent evaluator failed to do. He further did not see any documentation in the IEE as to how the stated diagnostic codes were directly affecting the Student's performance in the classroom. Further, during his testimony at the due process hearing, he also opined that he did not believe that the Student qualified under other health impairment or any area of impairment under Article 7, specifically, the Student was not adversely affected in his educational performance as reflected in his achievement tests.

41. The Student's world geography teacher for the second semester, 2006 noted that the Student had a 45%, or an F, prior to the Student's suspension. The Student did not turn in his work, acting like he did not want to be there. He had to keep the Student on task but did not observe sustained attention difficulties outside the norm. The Student did fine with other Students and he did have the ability to interact appropriately with other Students. The teacher did not see the Student having any impairment affecting his educational performance, only a lack of effort, nor did the teacher see anything affecting the Student's strength, vitality or alertness. The teacher did not suspect drug usage by the Student.
42. The Student's entrepreneur teacher for the second semester, 2006 did not see the Student as distracted, or as unable to function appropriately. He observed the Student conversing with other Students. He did not perceive that the Student was emotionally distressed or depressed. The Student did not sleep in class or have any problems with sustained attention. The Student was not a discipline problem nor did he display any inappropriate behaviors. The teacher did not believe the Student had any impairment adversely affecting his educational performance, nor have limited alertness. The teacher did not suspect drug usage by the Student.
43. The Student's health teacher for the first semester of the 2005-2006 school year noted that the Student did have attention problems somewhat more than others, had problems finishing things, was less organized, failed to follow instructions, made careless mistakes, failed to give close attention to details, had difficulty with sustained attention, and lacked interest in school work. The Student was not a behavior problem. The teacher believed the Student's mood was normal and that he was not depressed. The Student was frequently sleepy or tired. The teacher was of the opinion that the Student chose to not do the work. The Student's grades for the three six weeks were C, F, and C, with a D for the semester.
44. The Student's chemistry teacher for the first semester of the 2005-2006 school year noted that the Student did not do his work and had a negative attitude. The Student did not pay attention in class due to his lack of interest. The Student was observed to be tired and

sleepy. The teacher believe the Student had a lack of motivation, was not depressed, had the ability to build or maintain interpersonal relationships and she did not see any mood issues with the Student,

45. The Student's algebra teacher for both semesters of the 9th grade (2004-2005) noted that the Student started off with A's and B's on his tests and quizzes, but tapered off later in the school year. For the first semester the Student's grades for the three six week grading periods were: B-, B, and D, with a C for the semester. As to the second semester, the Student's grades were: B-, C, and F, with a C- for the semester. The Student's in-class behavior for the first semester was normal, but during the second semester the Student started putting his head down, especially when not seated next to a particular girl. The teacher opined that the Student interacted normally with other Students. He did not see the Student as depressed or as having a pervasive mood of unhappiness. The teacher believed the Student had the ability to give close attention to work but he failed to do his homework. The Student was able to follow instructions and organize tasks and had the necessary materials. The Student was not a discipline problem. The teacher did not see drugs as an issue with the Student. The teacher did not observe any form of impairment adversely affecting the Student's educational performance, nor did he observe limited alertness in the Student.
46. The Student's computer programming teacher for both semesters of the 10th grade noted that the Student's grade for the three six-week periods were: B, C and F, with a 1st semester grade of D. The teacher opined that as the programming became harder the Student tuned out. The Student was focused when the teacher was talking directly to him. If the Student was interested, he was focused. The Student did appear more distracted the last six week period. The Student appeared to get along well with the other Students. The Student was sleepy some days. The teacher believed this was due to staying up late, such as working or being on the computer. The Student was not a discipline problem. The only problem was to motivate the Student. He did not see the Student as depressed.
47. The Student's Geometry teacher for the 10th grade noted that the Student's grades fluctuated from C's when he turned in homework to F's when he did not turn in his homework, which was the case during the 2nd and 3rd six week periods. The teacher did not suspect drug usage by the Student. The Student appeared to be sleeping during lectures but did not sleep the rest of the class period. The Student was not turning in his homework. The teacher believed the Student opted to not do the work. The Student did not finish tests or use extra time allowed under his Sec. 504 plan. The Student was very personable and respectful, not causing problems. The Student did not have problems interacting with other Students. The teacher did not see the Student as impulsive or depressed, nor have a pervasive mood of unhappiness. The teacher believed the Student had the ability to maintain interpersonal relationships. The teacher did not observe any academic frustration in the Student. The teacher opined that the Student chose to not do the work. He did not observe that the Student was unable to pay attention.
48. The Student's English teacher for the 9th grade (2004-2005) viewed the Student as quiet, polite, and not a discipline problem. The Student's grades were in the C-D range, with difficulties on tests, quizzes and assignments. During lectures, the Student seldom took

notes, but during group time the Student conversed more over time and appeared to be on task. He also had the Student in study hall. He did not see the Student as depressed to the extent that it was affecting his work or relationships with other Students. The Student would put his head down to his desk once in a while. The teacher did not observe the Student as having a pervasive mood of unhappiness. The Student's major problem appeared to be a lack of motivation. The teacher did not observe signs that the Student was using drugs.

49. The assistant dean of Students, who handled discipline and attendance issues, had investigated the theft of the video camera. The Student had admitted that he stole the camera with no one else involved. He was familiar with the Student prior to the camera theft, having been involved with many of the Student's various tardies during the 10th grade. He noted a change in the Student's friends, demeanor, and appearance in the 10th grade, compared to the 9th grade. He thought that the Student may be using marijuana and possibly had the a-motivational syndrome (lack of motivation due to marijuana use).
50. The chairperson at the January 24, 2006 case conference was a supervisor at the local special education cooperative. The assistant principal who was at the conference had an endorsement in emotional disabilities. Further, the chairperson has been a teacher of service for many ED Students. She also acknowledged that a formal adaptive behavior assessment was not done prior to the case conference. However, she believed one could possibly do such an assessment informally by observing the Student and interviewing the Student, parents and teachers.
51. During the due process hearing, the school provided copies of the recordings of the January 11, 2005 and January 24, 2006 case conferences and the February 13, 2006 Sec. 504 Manifestation Conference to the father and this Hearing Officer.

Conclusions of Law

Issue 1

Did the school fail to supply a complete set of records (including MMPI-A) in a timely fashion and in response to a parental request?

Yes. 511 IAC 7-23-1(f) states "The public agency shall comply with a request from a parent or eligible Student to inspect and review the record:

- (1) without unnecessary delay;
- (2) before any meeting regarding an individualized education program, interim alternative educational setting, manifestation determination or a due process hearing; and
- (3) in no case more than forty-five (45) calendar days after the request is made."

The preponderance of the evidence established that the school did fail to timely provide the parents with copies of CD's of the January 11, 2005 and January 24, 2006 case conferences and the February 13, 2006 Sec. 504 manifestation conference, but the father had tape recorded these conferences himself. Further, the Student's middle school discipline records were not timely provided to the parents. However, the school immediately provided to the father copies of these records once they were aware of the existence of these records. These records were not in the

Student's permanent file but were stored on the middle school's computer. Further, although the protocols from the 2004 and 2005 evaluations did not appear to have been provided timely to the parents, these records were provided to the parents prior to the commencement of this due process hearing.

While the school did not provide all of the Student's educational records to the parents within the required (45) calendar days from the date of the parents' written request on February 27, 2006, the Student and the parents suffered no harm due to this procedural error. This due process hearing began on May 24, 2006 and did not conclude until August 11, 2006. This lengthy passage of time clearly allowed the Student and parents substantial time to review any records not provided within the required (45) calendar days from the date of the request and to have their own experts review and testify concerning these records. Pursuant to 20 USC Sec. 1415 (f) (2) (E) (ii), there is no denial of FAPE unless the procedural error impeded the Student's rights to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE or caused a deprivation of educational benefit. None of these bases existed here.

Issue 2

Did the school fail to supply the criteria for selecting an independent educational evaluator at public expense?

No. The preponderance of the evidence established that the school did so comply. The father requested an IEE at public expense on February 6, 2006. On February 14, 2006, the special education cooperative's director agreed to this request and provided the father with a list of four local qualified individuals to do an IEE. The director also advised the father that the criteria for the IEE was that to which the local special education cooperative needed to adhere, 511 IAC 7-25-5 (h). Further, in response to the father's February 21, 2006 request for the criteria used by the local cooperative when they conduct their own evaluations, the director advised the father that the evaluator must be an Indiana school psychologist or clinical psychologist with the evaluation conducted pursuant to 511 IAC 7-26. As of that time, the father did not indicate he was contemplating having the Student placed in a private school in South Carolina and having the Student evaluated there. The school did supply to the parents the criteria for selecting an independent educational evaluator.

Had the school failed to provide the criteria, this procedural violation would not have caused the Student or the parents any harm. On March 27, 2006, this Hearing Officer ordered the IEE at public expense. The parents did have the IEE conducted at public expense with the evaluator submitting a written psychological evaluation and then testifying at this due process hearing.

Issue 3

Did the school fail to provide doctor-requested teacher evaluation rating scales (Connors') in a timely fashion?

No. The preponderance of the evidence established the school did timely provide the requested rating scales. The father submitted to the school the rating scales in early January, 2006 after the Student's appointment with his private psychologist on January 5, 2006. On January 20, 2006, the high school guidance counselor copied the various teacher completed Connors' Behavior Rating Scales, placed the originals in an envelope with the Student's weekly

Friday progress reports, sealed the envelope, and gave it to the Student at the end of the school day for delivery to the parents. At no time has the father indicated he did not receive the weekly progress reports, but at the January 24, 2006 case conference, when asked by the guidance counselor if he had received the completed behavior rating scales, he indicated he had not. The guidance counselor then advised the father that she had placed the completed behavior rating scales in the Student's weekly envelope on January 20, 2006 and had given it to the Student. At the February 13, 2006 Sec. 504 manifestation conference, the father inquired of the high school assistant principal as to when he would receive the completed behavior rating scales. The high school assistant principal told the father that the completed rating scales had been sent home with the Student on January 20, 2006. Subsequently, the assistant principal had copies made of the completed behavior rating scales and supplied them to the father.

The Connors' Behavior Rating Scales were provided to the parents in a timely manner on January 20, 2006, with a second copy being supplied shortly after February 13, 2006.

The father argued that since he did not have the completed behavior rating scales by the January 24, 2006 case conference, he was therefore unable to submit this information to the committee to use in determining the Student's eligibility for special education services. During the 2005-2006 school year, many of the Student's teachers submitted written reports to the case conference committee. These reports were used in determining the Student's eligibility for special education services. These written reports included information that was similar to the information contained in the behavior rating scales. Had the behavior rating scales not been provided in a timely manner, this procedural error caused no harm to the Student or parents, due to the similarity of the information that was available at the January 24, 2006 case conference.

Issue 4

Did the school fail to conduct an appropriate educational evaluation?

No. The preponderance of the evidence established that the 2004 psychological evaluation and the December 12, 2005 Supplemental Evaluation were appropriate educational evaluations. The November, 2004 psychological evaluation was, in and of itself a comprehensive evaluation under Article 7, especially in conjunction with the January 4, 2005, Woodcock Johnson III administered to the Student. The December 12, 2005 Supplemental Evaluation was administered to the Student based upon the father's concerns as to whether the Student's social/emotional issues were negatively impacting the Student's school performance. No new cognitive or achievement testing was needed based upon the father's specific request and the recent evaluation in November, 2004.

Issue 5

Did the school fail to identify the Student as eligible for special education services?

No. The preponderance of the evidence established that the case conference committees of January 11, 2005 and January 24, 2006 properly determined that the Student was not eligible for special education and related services under Article 7. The evidence established that the case conference committees did consider all possible areas of eligibility and there was sufficient evidence to support the committees' findings of ineligibility under Article 7. The impairments pertinent to this hearing were learning disability, emotional disability, or other health impairment. These impairments are defined under Article 7 as follows:

511IAC 7-26-6

(a) an emotional disability is a condition that, over a long period of time and to a marked degree, consistently interferes with a Student's learning process and adversely affects the Student's educational performance. An emotional disability may include, but is not limited to, one or more of the following conditions:

- (1) A tendency to develop physical symptoms or fears associated with personal or school problems.
- (2) A general pervasive mood of unhappiness or depression.
- (3) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (4) An inability to build or maintain satisfactory interpersonal relationships.
- (5) Inappropriate behaviors or feelings under normal circumstances.

511IAC 7-26-8

(a) a learning disability:

- (1) is characterized by severe specific deficits in perceptual, integrative, or expressive processes involved in understanding or in using language, spoken or written, that adversely affect the Student's educational performance;
- (2) includes conditions referred to, or previously referred to, as:
 - (A) perceptual handicaps;
 - (B) brain injury;
 - (C) minimal brain dysfunction;
 - (D) dyslexia; and
 - (E) developmental aphasia.
- (3) May be manifested in disorders of:
 - (A) listening;
 - (B) thinking;
 - (C) speaking;
 - (D) reading;
 - (E) writing;
 - (F) spelling; or
 - (G) arithmetic; and
- (4) does not include learning problems due primarily to:
 - (A) visual;
 - (B) hearing; or
 - (C) motor disabilities;
 - (D) mental or emotional disability; or
 - (E) environmental, cultural, or economic disadvantage.

(b) identification as a Student with a learning disability and eligibility for special education shall be determined by the case conference committee upon finding that a severe discrepancy exists between the Student's academic achievement and normal or near normal potential...

511IAC 7-26-12

(a) Other health impairment means an impairment that adversely affects a Student's educational performance and is manifested by limited strength, vitality, or alertness due to chronic or acute health problems. It may also be manifested by heightened alertness to environmental stimuli that results in limited alertness with respect to educational performance.

The January 11, 2005 and the January 26, 2006 case conference committees reviewed all of the Student's then available evaluations and records and determined that the Student did not meet the criteria for any disability under Article 7. Each of the above three eligibility areas requires a disability that adversely affects a Student's educational performance. Considering all of the psychological evaluations, the Student's intellectual ability and performance on achievement tests, the school's evaluation of April 11 and 12, 2006, and the IEE, the Student does not have an impaired ability to learn, and in fact is learning. The psychologist in South Carolina acknowledged this fact.

Issue 6

Did the school fail to provide a FAPE designed to meet the Student's needs based on his disability?

No. The preponderance of the evidence established that the school properly found that the Student was not eligible for special education services. Therefore, an IEP was never developed for the Student and a free, appropriate public education (FAPE) under Article 7 is not required or applicable.

Issue 7

Did the school fail to correctly identify the Student's behavior as a manifestation of his disability and then administer inappropriate disciplinary action without due process?

No. The preponderance of the evidence established that the Student was ineligible for special education services. Therefore, a manifestation determination conference under Article 7 was never held to make a determination whether there was a causal relationship. Further, a Sec. 504 manifestation conference was held with the committee finding no relationship between the Student's Sec. 504 disability (ADHD) and his theft of the video camera. Further, an expulsion meeting was held with the Student and parents given the opportunity to confront and present any evidence. Therefore, there was no due process violation.

Issue 8

Did the school refuse to discuss alternative placement options during the time of the Student's suspension/expulsion?

No. The preponderance of the evidence established that the Student was not eligible for special education services. After the Student's suspension on February 11, 2006 through the expulsion meeting on March 16, 2006, since the Student had been determined ineligible for special education services, the school had no obligation to discuss alternative placement options under Article 7. The school offered an expedited evaluation and homebound services, but the father never agreed to this offer. If the father had requested an expedited evaluation or agreed to the school's offer of an expedited evaluation, the expulsion meeting would have been deferred until the results of the new expedited evaluation were obtained and a subsequent case conference was held to review the evaluation and possible eligibility under Article 7. However, this did not occur.

Issue 9

Did the school refuse to reconvene a case conference committee to consider decisions on previously suggested alternative placement recommendations?

No. The preponderance of the evidence established that the Student was not eligible for special education services. Therefore, there was no obligation for the school to reconvene a case conference. The father never requested a case conference be reconvened; he only requested mediation, to which the school never agreed. The suggested alternative placement at the school affiliated alternative school for general education Students was discussed at the January 24, 2006 case conference after the committee determined the Student was not eligible for special education services. The discussion at the case conference as to this alternative placement was due to the Student's general education academic failures and not as an Article 7 special education placement. This alternative school was also discussed at the February 13, 2006 Sec. 504 manifestation conference as a possible general education placement. This committee had nothing to do with determining eligibility or placement for special education services. Assuming the Student was incorrectly determined to be ineligible for special education services, the father failed to give the school timely prior notice of his intention to place the Student in a private school.

IHO's ORDER

Based upon the findings of fact and conclusions of law, IT IS ORDERED THAT, because the Student was properly determined to be ineligible for special education services, and since any procedural violations were of no consequence, with the Student and parents suffering no harm, the parents' request for reimbursement of the cost of the private school placement of the Student is hereby denied as is any other requested relief.

After the completion of the hearing and the issuance of the written decision by the IHO, the Student's father requested an electronic version of the transcript from the hearing. This issue apparently had not been addressed during the pre-hearing conferences. The Division of Exceptional Learners (DEL) of the Indiana Department of Education provided the father with an electronic copy of the transcript. The DEL made two electronic versions of the transcript and provided the extra version to the Board of Special Education Appeals (BSEA).

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

On September 26, 2006, the Student requested an extension of time to submit a Petition for Review. The motion was granted, and the Student was given until November 1, 2006, to file his Petition for Review. The Student timely filed his Petition for Review on November 1, 2006. November 13, 2006, the School requested an extension of time to prepare a response to the Petition for Review. The motion was granted on November 13, 2006, allowing the School until December 13, 2006 to respond to the Petition for Review.

Student's Petition for Review

The Student takes exception to Findings of Fact 2, 7, 9, 12, 13, 15, 18, 23, 24, 25, 27, 31-34, 38-48, and 51 because they are purportedly unsupported by adequate evidence. The Student lists numerous exhibits and excerpts from the testimony to support these claims. The Student challenges each of the nine (9) Conclusions of Law and the resulting Order.

The Student also raised two additional issues: Whether the Student's father was denied an electronic version of the transcript and whether the IHO clearly understood the issues for the hearing.

School's Response to the Petition for Review

The School responded to the Petition for Review on December 13, 2006. In its Response, the School asserted the IHO did properly consider the Student's diagnosis of ADHD, even though this diagnosis was not an issue in the Article 7 hearing. The School also asserted it was not error on the part of the school psychologist not to consider the Student's junior high school disciplinary records (Finding of Fact No. 7). The School has not contested the Student's additional diagnoses of Conduct Disorder and Oppositional Defiant Disorder. However, these diagnoses were not issues in the hearing. The IHO determined what evidence was relevant to the issues presented and based his decision on substantial evidence.

The School argues the Student, in his objections to Finding of Fact No. 12, raises new issues (alleged failure to comply with the notification requirements of 511 IAC 7-25-4 and 511 IAC 7-25-7). As these issues were not raised in the hearing, they should be prohibited on administrative review. In the alternative, the School denies that it violated the aforementioned Article 7 provisions.

The IHO did not inadequately summarize the evaluative data reported in Finding of Fact No. 13, the School represents. The School likewise disputes the Student's assertion that it relied upon "old" evaluation data when determining the student's eligibility for services (Finding of Fact No. 15). The School disputes the father's assertion that he did not receive the ratings scales until after a third request (Finding of Fact No. 18). The School also argued that Finding of Fact No. 23 is supported by substantial evidence, that the School complied with the Article 7 requirements where a parent requests an Independent Educational Evaluation, and that the failure to obtain written consent for homebound services is moot as the parents rejected the service.

The School also asserted that Finding of Fact No. 24 was supported by substantial evidence in the record, as was Finding of Fact No. 25. The School also argues that the Student's assertions regarding the expedited evaluation (Finding of Fact No. 27) are irrelevant because the parents rejected an expedited evaluation. These issues were not raised in the hearing. Finding of Fact No. 31 is also supported by the record, the School represents. The issue raised by the Student was not raised at the hearing. Finding of Fact No. 32 is supported by the record, as is Finding of Fact No. 33.

As to Finding of Fact No. 34, the parent's notification letter advising of the Student's placement in a private school was not timely served. This is supported by the record. The School argued the IHO properly determined the weight to accord witnesses, and the record supports his determinations in Finding of Fact Nos. 38, 39, 40, 41, 42, 53, 44, 45, 46, 47, 48, and 51. The School also believes the nine (9) Conclusions of Law are supported by the evidence, and that the Order is based upon the aforementioned Findings of Fact and Conclusions of Law. The School urges the BSEA to affirm the decision of the IHO.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The BSEA, by Notice of Review dated December 14, 2006, advised the parties that the Board of Special Education Appeals would review the matter on January 9, 2007. The review would be conducted without oral argument and without the presence of the parties. All three members of the BSEA were provided with copies of the record, the Petition for Review, the Response thereto, and the duplicate electronic verbatim transcript.

On January 9, 2007, BSEA members Cynthia Dewes and Rolf Daniel conducted the review. BSEA member Raymond W. Quist, Ph.D., was unable to attend due to illness. Based upon the IHO's written decision, review of the record as a whole, the Petition for Review, the Response thereto, the BSEA now makes the following Combined Findings of Fact and Conclusions of Law.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This matter is properly before the Board of Special Education Appeals due to the timely filing of a Petition for Review by the Student. The BSEA has jurisdiction to decide this matter as provided for under 511 IAC 7-30-4.
2. At the outset, it should be noted that not every conceivable fact is a "relevant fact" for consideration by an Independent Hearing Officer. During the course of an eight-day hearing, such as this one, an IHO will have available to him numerous "facts," but not all of these will be relevant. An IHO is not required to detail every "fact" presented. All hearing decisions must be based upon the kind of evidence that is substantial and reliable. I.C. § 4-21.5-3-27(d). The BSEA will not disturb Findings of Fact or Conclusions of Law except as provided by 511 IAC 7-30-4(j). In addition, a party may not raise an issue on administrative appeal to the BSEA that should have been raised in the due process hearing before the IHO. See 511 IAC 7-30-4(g) ("...Only matters raised in the initial due process hearing may be raised in a petition for review").
3. The BSEA, after review of the record, finds that the following Findings of Fact challenged by the Student are supported by substantial and reliable evidence in the record and, accordingly, will not be disturbed: Findings of Fact Nos. 2, 7, 9, 12, 13, 15, 18, 23, 24, 25, 27, 31, 32, 34, 38-48, and 51.
4. As to Finding of Fact No. 33, the Student asserts the IHO erred by adding the sentence, "He [the father] apparently did not request copies of any items from these records." The father's appeal stated that he did request and was provided copies of certain records. However, this is an inconsequential matter and has no bearing on any issue.
5. With respect to the nine (9) Conclusions of Law, the BSEA finds that the IHO properly determined and applied the Findings of Fact in deriving legal conclusions that are based on substantial and reliable evidence. Accordingly, no Conclusion of Law will be disturbed. The BSEA also finds that the School was not required to conduct a manifestation determination consistent with Article 7 because the Student

was not eligible for Article 7 services. The School did conduct a manifestation determination pursuant to Sec. 504. As for the issues regarding the Independent Educational Evaluation (IEE) (Issue 2), to the extent there were any procedural anomalies preceding the due process hearing request, these were addressed by the IHO's Order of March 27, 2006, ordering an IEE be conducted at public expense.

6. The IHO found and the BSEA agrees that the School did not fail to provide the Student a FAPE under Article 7 (Issue 6). The Student was properly found to be not eligible for services under Article 7. The School was not responsible for providing any services to the Student under Article 7 because he was properly found not to be eligible for such services.
7. 511 IAC 7-30-3(n)(5) provides that a parent has the right to "obtain a written or electronic verbatim transcript of the proceedings at no cost." 511 IAC 7-30-3(s) provides additionally that "[t]he transcript shall be made available by the division of special education [now the Division of Exceptional Learners] at no cost and upon the request of any party to the hearing at the conclusion of the hearing. Although the exact date is uncertain, the Student's father requested from the Division of Exceptional Learners an electronic version of the transcript. This request was made within two (2) weeks of the issuance of the IHO's written decision on September 1, 2006. The Division of Exceptional Learners did provide the Student's father with an electronic version of the transcript, although the father asserts he was unable to open it. The Division of Exceptional Learners provided the BSEA with an exact duplicate of the electronic transcript provided to the father. This has been marked as "BSEA Exhibit A." The BSEA experienced no difficulties in opening and perusing the electronic transcript. Additionally, the Student requested an extension of time on September 26, 2006, to prepare and file a Petition for Review, based on the lack of an electronic transcript. The BSEA granted the request and gave the Student until November 1, 2006, to prepare and file his Petition for Review. There is no merit to the father's assertion he did not receive a verbatim transcript in electronic form from the Division of Exceptional Learners.
8. With regard to the allegation the issues were not clearly understood by the IHO, the BSEA notes that the IHO's pre-hearing order of March 27, 2006, delineated the issues. This followed a pre-hearing conference conducted the day previously where the Student's father participated in the framing of the issues. The father did not object at any time that the issues were not clearly delineated. The late objection raised in the Petition for Review is not timely. Even if timely, the record is against the Student in this regard. The Issues were and are clearly delineated. The IHO's decision indicates he unequivocally understood and addressed the issues.

ORDERS

1. The IHO's decision, as written, is affirmed in all respects.
2. The IHO properly identified the issues for the hearing.

3. The Division of Exceptional Learners provided the parent with an electronic version of the verbatim transcript, as required by 511 IAC 7-30-3(s).
4. Any other issue raised by Petitioner but not specifically addressed above is deemed denied.

DATE: January 7, 2007

/s/Rolf W. Daniel

Rolf W. Daniel, Ph.D., Chair
Board of Special Education Appeals

APPEAL RIGHT

Any party aggrieved by the decision of the Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to request judicial review in a civil court with jurisdiction, as provided for by I.C. § 4-21.5-5-5 and 511 IAC 7-30-4(n).